

2013 IL App (1st) 112866-U

SIXTH DIVISION  
December 13, 2013

No. 1-11-2866

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 98 CR 26410
	)	
FRANCISCO CHAVEZ,	)	Honorable
	)	Joseph G. Kazmierski, Jr.,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE LAMPKIN delivered the judgment of the court.  
Justices Hall and Reyes concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Where defendant cannot meet either prong of the *Strickland* test for ineffective assistance of counsel, the dismissal of his post-conviction petition claiming ineffective assistance of trial counsel will be affirmed. Defendant cannot establish that he was denied reasonable assistance of post-conviction counsel when he has failed to rebut the presumption of compliance with Rule 651(c) triggered by the filing of a Rule 651(c) certificate.
- ¶ 2 Defendant Francisco Chavez appeals from the second stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2002)). On appeal, he contends that his petition was improperly dismissed because it made a substantial

showing that he was denied effective assistance of counsel at sentencing when trial counsel failed to present defendant's medical records and expert testimony regarding defendant's mental illness to the court as mitigation evidence. In the alternative, defendant contends that post-conviction counsel provided unreasonable assistance in violation of Supreme Court Rule 651(c) (eff. Dec. 1, 1984), when she failed to support his claim of ineffective assistance of counsel with appropriate documentation. We affirm.

¶ 3 Following a bench trial, defendant was convicted of attempted first degree murder and predatory criminal sexual assault of a child, and was sentenced to a total of 40 years in prison.

¶ 4 Prior to trial, defendant was examined by clinical psychologist Paul Fauteck who opined that although defendant had been prescribed anti-psychotic medication and claimed to experience some symptoms related to schizophrenia, defendant did not qualify for that diagnosis and exhibited no evidence of confused or illogical thinking. Psychiatrist Philip Pan also examined defendant, who was not taking psychotropic medications while incarcerated, and opined that defendant suffered from conduct disorder, a not otherwise specified learning disorder, cannabis dependence, alcohol abuse, and a not otherwise specified history of a psychotic disorder.

¶ 5 The matter proceeded to a bench trial where the evidence established, in part through the testimony of the victim S.F. and defendant's inculpatory statement, that in September 1998, defendant strangled the 12-year-old victim until she was unconscious and then engaged in sexual intercourse with her. Defendant thereafter cut the victim's throat with a piece of glass.

¶ 6 Defendant's presentence investigation report (PSI) indicated, *inter alia*, that defendant had received inpatient treatment at River's Edge Hospital, had been diagnosed with schizophrenia, and had taken Risperdal, a psychotropic medication, prior to his incarceration.

¶ 7 At sentencing, trial counsel argued in mitigation that defendant did not have his parents around as he grew up, and that he never knew his father and could not even remember what his

mother looked like. He also argued that defendant was employed and enrolled in junior college at the time of his arrest, and that defendant "has had his demons. He was found fit and sane by the doctors here. However, they did review extensive records from Riverside Hospital in Forest Park where [defendant] had been in residential care diagnosed as a schizophrenic. He was found fit and sane but he has had his own demons, your Honor and in the nature of a condition which just complicated the situation he was in through his lack of family support." Furthermore, counsel highlighted defendant's prior abuse of alcohol and marijuana, and argued that although there was no excuse for defendant's behavior, there was significant mitigation to be found in defendant's family background, mental health issues, and history of substance abuse. Counsel also presented five character letters on defendant's behalf, and argued that defendant could become a contributory member of society. Counsel concluded by asking the court for leniency. Throughout counsel's argument he repeatedly referenced the PSI as documenting his representations to the court.

¶ 8 Ultimately, the trial court sentenced defendant to two consecutive terms of 20 years in prison. This judgment was affirmed on appeal. See *People v. Chavez*, No. 1-00-1790 (2002) (unpublished order under Supreme Court Rule 23).

¶ 9 In April 2003, defendant filed a *pro se* post-conviction petition alleging, *inter alia*, that he was denied the effective assistance of counsel when trial counsel failed to file a motion to suppress his confession based upon a lack of consular notification and to present certain medical records and expert testimony regarding defendant's mental illness in mitigation at sentencing. The petition was docketed and post-conviction counsel was appointed.

¶ 10 At a subsequent hearing, post-conviction counsel indicated that she had been unable to obtain defendant's medical records because defendant had not signed a release. At another

hearing, post-conviction counsel indicated that she had "many" of defendant's records, but had not gotten a "very good response." In 2007, new post-conviction counsel was appointed.

¶ 11 In January 2011, post-conviction counsel filed a supplemental petition for post-conviction relief which, in addition to incorporating the allegations of defendant's *pro se* post-conviction petition, alleged that trial and appellate counsel were ineffective when they failed to argue that defendant was denied due process and a fair trial when he was not informed of his right to consular assistance pursuant to the Vienna Convention. Counsel also filed a certificate pursuant to Rule 651(c). The State then filed a motion to dismiss, which the circuit court granted.

¶ 12 On appeal, defendant first contends that the circuit court erred when it dismissed his petition because it made a substantial showing that he was denied the effective assistance of counsel at sentencing when trial counsel failed to present mitigating evidence regarding defendant's mental illness through medical records and expert testimony.

¶ 13 The Act provides a procedural mechanism through which a defendant may assert a substantial denial of his constitutional rights in the proceedings which resulted in his conviction. 725 ILCS 5/122-1 (West 2002). If the circuit court does not dismiss the post-conviction petition as frivolous or patently without merit, then the petition advances to the second stage where counsel is appointed to represent the defendant, if necessary (725 ILCS 5/122-4 (West 2002)), and the State is allowed to file responsive pleadings (725 ILCS 5/122-5 (West 2002)).

¶ 14 At the second stage, it is the defendant's burden to make a "substantial showing of a constitutional violation." *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). A "substantial showing" of a constitutional violation is a measure of the legal sufficiency of a defendant's well-pled allegations of a constitutional violation which, if proved at an evidentiary hearing, would entitle him to relief. *People v. Domagala*, 2013 IL 113688, ¶ 35. Therefore, all well-pled facts in the petition that are not positively rebutted by the trial record are taken to be true. *Pendleton*,

223 Ill. 2d at 473. If a defendant makes a substantial showing that his constitutional rights were violated, the matter proceeds to a third stage evidentiary hearing where the circuit court serves as a fact-finder and resolves evidentiary conflicts, weighs credibility, and determines the weight to be given testimony and evidence. *Domagala*, 2013 IL 113688, ¶¶ 34, 46. This court reviews the dismissal of a petition at the second stage of proceedings *de novo*. *Pendleton*, 223 Ill. 2d at 473.

¶ 15 To show an attorney's representation was ineffective, a defendant must establish that counsel's performance was deficient and that this deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). When determining whether an attorney's performance was unreasonable, the reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Strickland*, 466 U.S. at 689, quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955). A defendant shows prejudice by showing a reasonable probability, *i.e.*, a probability sufficient to undermine confidence in the outcome of the proceeding, that but for counsel's errors the proceeding would have resulted in a different outcome. *Strickland*, 466 U.S. at 694. Our supreme court has held that *Strickland* requires a defendant to show actual prejudice in order to succeed on his claim, rather than mere speculation as to prejudice. *People v. Bew*, 228 Ill. 2d 122, 135-36 (2008). Failure to satisfy either part of the *Strickland* test defeats a claim of ineffective assistance. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001).

¶ 16 Here, defendant does not contend that trial counsel did not raise the issue of defendant's mental health in mitigation at sentencing. Nor could he, as the record reveals that counsel argued in mitigation at sentencing that defendant had previously been diagnosed with schizophrenia and treated for this illness on an inpatient basis. Rather, defendant objects to the way in which

counsel presented defendant's mental illness, arguing that counsel should have presented defendant's medical records and expert testimony in order to show the trial court the extent of defendant's mental illness, rather than briefly mentioning it at sentencing. Defendant also contends that counsel should have provided certain medical records to the probation officer who conducted defendant's presentence investigation.

¶ 17 Initially, this court notes that our supreme court has determined that trial counsel "cannot be faulted for failing to introduce mitigation evidence that was already contained" in the PSI. *People v. Griffin*, 178 Ill. 2d 65, 87 (1997). In this case, the report described defendant's diagnosis of schizophrenia, hospitalization, and prior use of Risperdal. Thus, the information that defendant would have had trial counsel introduce at sentencing was already presented in the report; counsel cannot be ineffective for failing to introduce it again. *Griffin*, 178 Ill. 2d at 87. In any event, although trial counsel focused on defendant's youth, lack of parental involvement, and potential for rehabilitation at sentencing, counsel did raise defendant's mental health history, including his prior diagnosis of, and treatment for, schizophrenia. This court also rejects defendant's assertion that he was denied effective assistance of counsel by counsel's failure to make defendant's medical records available to the probation officer who conducted the presentence investigation as defendant cites no authority for such a proposition and information regarding defendant's mental health was included in the report through defendant's conversation with the probation officer.

¶ 18 As *Strickland* instructs, this court evaluates the reasonableness of counsel's challenged conduct "from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Here, applying deference to counsel's judgment (*Strickland*, 466 U.S. at 691), we conclude that defendant has failed to establish that trial counsel's performance fell below an objective standard of reasonableness as counsel's decision not to elaborate upon the details of defendant's mental

health history but, rather, to focus on defendant's lack of parental guidance and potential for rehabilitation was not "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" (*Strickland*, 466 U.S. at 687). Rather, this was simply a strategic decision which we shall not second-guess. See *Strickland*, 466 U.S. at 689 (it is "tempting" for a defendant to second-guess counsel's assistance after receiving an adverse sentence and it is "all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable"). As defendant has not shown that his counsel's performance was deficient, he has failed to satisfy the first prong of the *Strickland* test, and his claim of ineffective assistance of counsel must fail. *Edwards*, 195 Ill. 2d at 163.

¶ 19 Even were this court to determine that trial counsel's performance was deficient, defendant's claim would still fail as his prejudice argument is based on speculation as to what sentence he might have received if a more detailed recitation of his mental health history had been revealed to the court, rather than a showing of actual prejudice. See *Bew*, 288 Ill. 2d at 135-36; see also *People v. Palmer*, 162 Ill. 2d 465, 481 (1994) (proof of prejudice cannot rest on "mere conjecture or speculation"). In the sentencing context, in order to establish prejudice from trial counsel's ineffectiveness, defendant must establish that, but for trial counsel's failure to extensively highlight his mental illness at sentencing, he would have received a lighter sentence. See *Griffin*, 178 Ill. 2d at 87-88 (addressing an ineffective assistance of counsel claim by determining whether there was a reasonable probability that, absent trial counsel's alleged deficiencies, the court would have found that the mitigating circumstances precluded the sentence imposed). As noted above, even without detailed argument from trial counsel, the court had before it a PSI that discussed defendant's mental health history and treatment and counsel for defendant repeatedly referenced the court to the contents of the PSI. Absent some indication to

the contrary, reviewing courts presume that a trial court considered any mitigating evidence before it. *People v. Thompson*, 222 Ill. 2d 1, 45 (2006). Because the defendant offers no evidence, aside from the sentence, that the trial court failed to consider his mental health history as mitigating evidence, this court must assume that the trial court properly considered it.

*Thompson*, 222 Ill. 2d at 45.

¶ 20 Although defendant argues that he would have received a more appropriate sentence if the court knew the details of his mental health issues and how they may have influenced his behavior on the night of the offense, he cites no authority for the proposition that having a mental illness is always a mitigating factor at sentencing. See *People v. Pulliam*, 206 Ill. 2d 218, 241 (2002) ("evidence of a turbulent and abusive childhood or of psychological and developmental problems is not inherently mitigating"); *People v. Peebles*, 205 Ill. 2d 480, 550-51 (2002) (evidence of defendant's mental illness may either serve as a mitigating factor by evoking compassion or an aggravating factor by creating a fear that the condition will prevent future deterrence). As defendant offers this court only speculation as to what might have happened if trial counsel had presented additional details regarding defendant's mental health to the court, we reject defendant's argument that he was prejudiced by counsel's decision not to present defendant's medical records and expert testimony at sentencing. See *Bew*, 288 Ill. 2d at 135-36. Accordingly, because defendant has failed to make a "substantial showing of a constitutional violation" (*Domagala*, 2013 IL 113688, ¶ 35), the circuit court correctly dismissed his post-conviction petition.

¶ 21 In the alternative, defendant contends that he was denied the reasonable assistance of post-conviction counsel when counsel failed to attach defendant's medical records and affidavits from expert witnesses to support defendant's claim that he was denied effective assistance of counsel at sentencing or to explain their absence.



¶ 22 The Act requires only a reasonable level of assistance by counsel during post-conviction proceedings. *People v. Moore*, 189 Ill. 2d 521, 541 (2000). In order to ensure this reasonable level of assistance, Supreme Court Rule 651(c) (eff. Dec. 1, 1984), requires appointed counsel to: (1) consult with the defendant by mail or in person to determine the defendant's claims of constitutional deprivation; (2) examine the record of the challenged proceedings; and (3) make any amendments that are "necessary" to the petition previously filed by the *pro se* defendant to present the defendant's claims to the court. The purpose of the rule is to ensure that post-conviction counsel shapes a defendant's allegations into a proper legal form and presents them to the court. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 18. An attorney's substantial compliance with the rule is sufficient. *Profit*, 2012 IL App (1st) 101307, ¶ 18. This court reviews an attorney's compliance with a supreme court rule *de novo*. *Profit*, 2012 IL App (1st) 101307, ¶ 17.

¶ 23 When a Rule 651(c) certificate is filed, the presumption exists that the defendant received the representation that the rule requires him to receive during second stage proceedings under the Act. *People v. Rossi*, 387 Ill. App. 3d 1054, 1060 (2009). A defendant has the burden to overcome this presumption by demonstrating that post-conviction counsel failed to substantially comply with the duties required by Rule 651(c). *Profit*, 2012 IL App (1st) 101307, ¶ 19.

¶ 24 In the case at bar, post-conviction counsel filed a supplemental petition and a Rule 651(c) certificate, thus creating a presumption that defendant received the representation required by the rule at the second stage of proceedings. *Rossi*, 387 Ill. App. 3d at 1060. However, defendant contends that he has rebutted the presumption of substantial compliance. Specifically, he contends that counsel failed to attach defendant's medical records and the affidavits of potential expert witnesses to the petition to support defendant's contention that trial counsel was

ineffective for a failure to present, in mitigation at sentencing, evidence of defendant's mental health issues.

¶ 25 Initially, we reject defendant's contention that his post-conviction counsel acted unreasonably by failing to attach the affidavits of unnamed experts who could have testified as to the details or extent of his mental illness at sentencing, as nothing indicates that such experts exist. See *People v. Johnson*, 154 Ill. 2d 227, 247-48 (2007) (defendant has the obligation to inform counsel with specificity of the identity of witnesses who should have been called in his defense, as counsel has no obligation "to engage in a generalized fishing expedition in search of support for claims raised in a petition").

¶ 26 With regard to defendant's claim that post-conviction counsel acted unreasonably when she failed to attach certain medical records to support his claim that he was denied the effective assistance of counsel at sentencing, this court has already addressed the underlying substance of that claim at length, and determined that defendant was not denied effective assistance of trial counsel when counsel failed to submit defendant's medical records as mitigation evidence at sentencing. As noted above, Rule 651(c) does not require post-conviction counsel to advance frivolous or spurious claims (see *Pendleton*, 223 Ill. 2d at 472), and consequently, this court rejects defendant's argument that post-conviction counsel acted unreasonably when she failed to attach defendant's medical records in support of his claim that he was denied effective assistance of trial counsel at sentencing. See *People v. Greer*, 212 Ill. 2d 192, 205 (2004) (although Rule 651(c) requires post-conviction counsel to make any amendments necessary to a *pro se* petition, in those cases where "amendments to a *pro se* postconviction petition would only further a frivolous or patently nonmeritorious claim, they are not 'necessary' within the meaning of the rule").

¶ 27 Here, post-conviction counsel filed a certificate pursuant to Rule 651(c), thus triggering the presumption of compliance with the Rule (*Rossi*, 387 Ill. App. 3d at 1060), and defendant has failed to rebut this presumption (see *Profit*, 2012 IL App (1st) 101307, ¶ 19). Consequently, defendant has failed to establish that he was denied the reasonable assistance of post-conviction counsel (see *Moore*, 189 Ill. 2d at 541), and his petition was properly dismissed.

¶ 28 Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 29 Affirmed.